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The Ninth Circuit and Arizona’s S.B. 1070

With a statewide [E-verify mandate](#) in 2008, Arizona pioneered state-led immigration enforcement measures, and since then we have seen a [number of states](#) adopt similar measures. Meanwhile, Arizona continues with its efforts to address immigration and the undocumented population working and residing in the state at a time when the federal government is failing to act.

The most recent development in this battle occurred on April 11, when the state was unsuccessful in challenging a U.S. District Court injunction blocking key provisions of the controversial Arizona law, known as S.B. 1070, in a case brought by the Department of Justice (DOJ). Siding with the Obama administration, a three-judge panel of the U.S. Ninth Circuit Court of Appeals affirmed the lower court’s ruling enforcing the injunction ([United States v. Arizona, 9th Cir., No. 10-16645, 4/11/11](#)). S.B. 1070 took effect on July 29, 2010. However, one day before that, on July 28, the district court granted a preliminary injunction, blocking certain provisions of the law from going into effect.



Due in part to the conflict between provisions of S.B. 1070 and federal immigration policy, four provisions of S.B. 1070 continue to be blocked under the injunction, (United States v. Arizona, D. Ariz., No. 2:10-cv-01413, preliminary injunction 7/28/10; 144 DLR AA-1, 7/28/10). Under the doctrine of preemption, if either specific provisions or the law in whole is deemed to be preempted by federal law, it will then be deemed unconstitutional.

The DOJ contends that federal immigration law preempts S.B. 1070 in whole, and in granting the injunction, the Court noted that the DOJ was likely to succeed in its claim. Judge Richard Paez noted that “[t]here can be no constitutional application of a statute that, on its face, conflicts with congressional intent and therefore is preempted by the supremacy clause.” Under the Constitution, federal law is the supreme law of the land. When a state law clashes with federal law, it is up to the courts to decide whether the state law is preempted by the federal law.

The Ninth Circuit Court found that Arizona's law undercuts the national scheme enacted by Congress and complicates the conduct of U.S. foreign policy. In addition, the court echoed concerns voiced by many that such state-specific laws have the potential to create a patchwork of legislation in all fifty states, a prospect feared by companies conducting business and hiring workers nationwide. In its decision, the Ninth Circuit identified provisions in the Arizona law which present explicit conflicts, as well as obstacles to, the enforcement of federal law. Specifically the court identified the following:

- Section 2(B) - provision requiring state police to check the immigration status of all individuals stopped, detained or arrested if the officers "reasonably" suspect the individual of being in the country illegally. The Ninth Circuit concluded that the provision is preempted by the law responsible for the 287(g) program. This program allows local police to enforce immigration laws under federal supervision, thereby barring states from independently granting their officers the authority to enforce federal immigration laws.
- Sections 3 and 5(C) - provisions making it a state crime to fail to apply for or carry alien registration papers, and to work, or solicit work, without federal authorization. The court found both provisions to be unconstitutional as Congress left no room for states to regulate and require individuals in the United States to carry federal immigration documents.
- Section 6 - provision authorizing warrantless arrests of aliens believed to have committed offenses that make them removable from the United States, even when prosecutors previously declined to bring charges against the individual. The court did not agree that state police have "inherent authority" to arrest persons for being unlawfully present in the United States. Interestingly, a recent decision in the Tenth Circuit reached a different conclusion, and this increases the odds that the challenge to S.B. 1070 will indeed reach the Supreme Court.

Given that one judge on the three-judge panel dissented in the decision, Arizona may ask for the case to be reargued before a larger panel of Ninth Circuit judges before appealing the injunction to the Supreme Court. If the Supreme Court declines to step in, the case will be returned to the trial judge in the District Court to review the case on its merits and determine whether the temporary injunction should become permanent.

The GT Business Immigration and Compliance team will continue to report on S.B. 1070 and Arizona's response to this decision, as well as the enactment and implementation of laws impacting employers as more and more states and localities adopt increasingly strict measures aimed at addressing illegal immigration.

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[Greenberg Traurig's Business Immigration and Compliance Group](#) has extensive experience in advising multinational corporations on how to minimize exposure and liability regarding a variety of employment-related issues, particularly I-9 employment eligibility verification matters. In addition to assisting in H-1B (Labor Condition Application) audits, GT develops immigration-related compliance strategies and programs and performs internal I-9 compliance inspections. GT has also successfully defended businesses involved in large-scale government worksite enforcement actions, I-9 Audits and Department of Labor Wage and Hour investigations. GT attorneys provide counsel on a variety of compliance-related issues, including penalties for failure to act in accordance with government regulations, IRCA anti-discrimination laws-Office of Special Counsel Investigations, and employers' responsibilities when faced traditional no-match situations as well as more serious workplace identity theft or other alleged misrepresentations made by employees.

For more insight into immigration compliance and enforcement issues, please visit GT's Immigration Compliance blog at:
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